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Superfund Cost Recovery Conference

Aviall and ASARCO

Case Studies



Aviall Industries

- Aviall Industries, Inc. is a party in a case that reached the U.S. Supreme Court. The case concerned Aviall's ability to get a share of its costs – known as “contribution” – for hazardous site cleanup from another company.
- CERCLA § 113(f)(1) provides, in part: “Any person may seek contribution from any other person who is liable or potentially liable under section 9607(a) of this title, during or following any civil action under section 9606 of this title or under section 9607(a) of this title.”



Fallout From Aviall

- § On Monday, April 23rd the US Supreme Court heard argument (US v. Atlantic Research Corp.) of whether a private party has a cost recovery right under Section 107 (as opposed to a contribution right under 113).
- § The United States' position in front of the Court is that a private party does not have a cost recovery right under 107.
- § DOJ argued that Section 107 is critical for maintaining the intent of the Superfund law.
- § Congress did not want PRPs to be able to sue each other for voluntary cleanups for fear of doing so would discourage PRPs from entering into settlements with the government.



Aviall Impact

- § Overall, the *Aviall* decision has not (as of yet) had a significant impact on Superfund enforcement.
- § The decision has had an impact on some brownfields and voluntary cleanup projects.
- § There are, however, a number of outstanding issues that could impact the enforcement program.
 - § Potential lack of willingness of parties to settle CERCLA liability
- § CDs avoid any *Aviall* problem, but that it's not possible, as a matter of resources, for DOJ to accept every referral it receives.



Aviall: Next Up

- § Continue to work with Regions to identify cases where there may be an Aviall impact.
- § HQ workgroup continues to monitor cases



ASARCO History

- § ASARCO operated mines, mills and smelters for more than 100 years
 - § Acquired by Grupo Mexico in 1999 and now a subsidiary of Americas Mining Company (AMC)
- § Processed lead, copper, zinc and asbestos
- § Obligations under numerous CDs, AOCs, UAOs
- § 2001 – ASARCO wasn't performing and even contractors of the company were stopping work
- § ASARCO asked EPA for a "global settlement" including release from liability with covenants not to sue
- § EPA analysts said ASARCO didn't have sufficient assets to make this settlement



ASARCO Environmental Trust

- § 2003 CD – NOT a CERCLA settlement
 - § Forgave ~\$100M penalties
 - § Forgave past costs of ~\$4M
- § Created independent “ASARCO Environmental Trust”
 - § \$100M in \$12.5M notes with 7% interest paid annually
- § Gave ASARCO a temporary enforcement stay—3 years



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ASARCO Environmental Trust

- § The US is the final decision maker on expenditure of funds
- § Flexibility—funds not limited to sites with ASARCO settlements, ie., Omaha Lead
 - § US can spend at any site it believes ASARCO is liable
- § Interest earned is higher than the Treasury rate (7% v. ~2%)



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ASARCO Bankruptcy

- On August 1, 2006, the United States filed a bankruptcy supplemental proof of claim against Asarco.
- The POC presented EPA's claims against Asarco at over 26 sites across 8 EPA Regions.
 - Couer d' Alene, Commencement Bay, Omaha Residential, El Paso Residential, Hayden Smelter, California Gulch
- EPA's claims against Asarco, including past costs, future work and penalties, are valued (on a joint and several liability basis) in excess of \$1,300,000,000.
- EPA and ASARCO are currently negotiating a Plan of Reorganization and the proper characterization of EPA's claims
- These claims will still be subject to the claims of other ASARCO creditors



ASARCO Bankruptcy & Trust Implications

- The payments to the Trust are guaranteed by Grupo Mexico and AMC.
- Payments have been made as agreed to date.
- ASARCO's other creditors may still challenge the Trust, the Bankruptcy Court has to rule if it is part of ASARCO's estate
- The US and ASARCO believe the Trust is not part of the bankruptcy estate since the payments are not from ASARCO and it is an independent trust.



ASARCO: Next Up

- ASARCO has liability at a many sites for which there is no CD and no legal action has been initiated by the US.
- In bankruptcy, the US (or any creditor) does have the time to negotiate CDs or bring traditional legal action.
- The bankruptcy alternative is to have Cost Estimation Hearings—like mini-trials on remaining liability.
- ASARCO and the US will present their evidence to the bankruptcy Judge, who will then make a binding determination on the amount of EPA's allowed claim at each site.
- The hearings will occur this summer and fall, and first up is Cal Gulch, beginning in late July.



Contacts

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